Supreme Court of the United States

October Term, 1977

No. 77-1599

GEORGIENA N. COOK,
Petitioner,

vs.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For the Sixth Circuit

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions, Statutes and Rules

Text

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OPINIONS BELOW

The order of December 19, 1977, by the court of appeals, finding petitioner's appeal to be completely frivolous, and the order of February 15, 1978, that a petition for rehearing with a request for rehearing en banc be denied, are both unreported and likely to remain so.

The order of the district court and the judgment entry of November 30, 1976, effectively treating respondent's motion to dismiss as one for summary judgment and granting the same are also unreported.

The orders of both courts below are reprinted in the Appendix hereto.

JURISDICTION

This petition was filed within ninety (90) days of the order denying petitioner's timely filed petition for rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

I. Does the record in this case, however factually limited, present significant or consequential questions as to deprivation of procedural due process fostered first by the actions of an Ohio conservancy district prior to the complaint in this case, then by the district court's summary dismissal before answer, and finally by the court of appeal's summary affirmance?

II. Is petitioner entitled to a full consideration of the allegations that an Ohio conservancy district violated both her substantive and procedural due process rights as well as those of the class members whom she seeks to represent?

III. When an Ohio conservacy district has acquired title to unimproved farm land next to a Corps of Engineers lake, subdivided the farm land into unimproved building sites, and thereafter prepared a contract of adhesion conveying a property interest in a specific building site to petitioner, such contract requiring of substantial financial investments by petitioner to increase the value within the building site area:

(a) Is the Ohio conservacy district required to appear in a federal district court (at a trial on the merits seeking declaratory and equitable relief) to answer and defend against petitioner's allega-

tions involving unilateral executive action and "economic coercion" by the conservancy district, and the priority or proper balance between contract rights claimed by the conservacy district and petitioner's constitutional rights based upon the real property law of Ohio, which provides that payment of an annual "ground rent" is an attribute of a permanent leasehold interest in the specific building site?

(b) Is a federal district court ever required to recognize that a citizen, such as petitioner, has the constitutional right to a trial on the merits of a controversy when such controversy arises from a contract relating to a building site "owned" by the Ohio conservancy district, but claimed by petitioner as a "permanent leasehold interest" created by annual payments of "ground rent" and by a "first preferential right and option" to renew in 14-year increments?

CONSTITUTIONAL PROVISIONS, STATUTES AND PROCEDURAL RULES INVOLVED

The Due Process Clause of the Fourteenth Amendment provides:

> ". . . nor shall any State deprive any person of . . . property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

The Bill of Rights, Article V, provides:

> ". . . nor shall private property be taken for public use, without just compensation."

28 U.S.C. §1254(1) provides:

"Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods: (1) By writ of certiorari granted upon the petition of any party to any civil . . . case."

28 U.S.C. §2201 provides:

"In a case of actual controversy within its jurisdiction, . . ., any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such."

28 U.S.C. §2202 provides:

"Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment."

28 U.S.C. §1343 provides:

"The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: . . . (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States; (4) To recover damages or to secure equitable or other relief under

any Act of Congress providing for the protection of civil rights, ..."

42 U.S.C. §1983, enacted as §1 of the Civil Rights Act of 1871, 17 Stat. 13, provides:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Rule 1, Federal Rules of Civil Procedure, provides:

"These rules govern the procedures in the United States District Courts in all suits of a civil nature . . . in equity . . . They shall be construed to secure the just, speedy and inexpensive determination of every action."

Rule 12, Federal Rules of Civil Procedure, provides:

"(a) A defendant shall serve his answer within 20 days after the service of the summons and complaint upon him, ...

. . . .

(b) Every defense, in law or fact, to a claim for relief in any pleading, . . ., shall be asserted in the responsive pleading thereto . . ., except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, . . . , (6) failure to state a claim upon which relief can be granted,

. . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

. . . .

(h) . . . .

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."

Rule 23, Federal Rules of Civil Procedure, provides:

". . . .

(b) An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

. . . .

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; . . . ."

Rule 57, Federal Rules of Civil Procedure, provides:

"The procedure for obtaining a declaratory judgment pursuant to Title 28 U.S.C. §2201, shall be in accordance with these rules, and the right to trial by

jury may be demanded under the circumstances and in the manner provided in Rules 38 and 39. The existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate. The court may order a speedy hearing of an action for a declaratory judgment and may advance it on the calendar."

Rule 62, Federal Rules of Civil Procedure, provides:

". . . .

(d) When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal or of procuring the order allowing the appeal, as the case may be. The stay is effective when the supersedeas bond is approved by the court."

Rule 3, United States Court of Appeals for the Sixth Circuit, provides:

". . . .

(e) In the interest of docket control, the chief judge may from time to time, in his discretion, appoint a panel . . . to review pending cases for appropriate . . . disposition under Rule . . . 9 . . . of this court."

Rule 9, United States Court of Appeals for the Sixth Circuit, provides:

"If upon the hearing of any interlocutory motion or as a result of a review under Rule 3(e), it shall appear to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed."

Section 6101.03(F), Ohio Revised Code, (see, p. 24).

Section 6101.08, Ohio Revised Code, (see, p. 25).

Section 6101.15, Ohio Revised Code, (see, p. 25).

Section 6101.17, Ohio Revised Code, (see, p. 25).

STATEMENT OF THE CASE

Petitioner filed suit in the federal district court on September 24, 1976, against respondents under 42 U.S.C. §1983 and its jurisdictional counterpart, 28 U.S.C. §1343, charging that her interest in property has been adversely affected in violation of the Fourteenth Amendment and seeking declaratory and injunctive relief under 28 U.S.C. §2201.

The Judgment of the district court dismissing petitioner's complaint, entered November 30, 1976, was before answer. Therefore, the factual allegations of the complaint are taken to be proven and true. In relevant part, the complaint reads—

> "1. The named Plaintiff . . . is now and has been since September 1, 1962, the 'Lessee' of Lot A-431, Arrowhead Allotment on Atwood Lake, Carroll County, Ohio.
>
> 2. The Plaintiff did, on or about September 28, 1962, cause a water well to be drilled on Lot A-431; which well was the first proven and working water well to have been drilled on the western end of the Arrowhead Cottage Area; and, did, on or about September, 1964, cause a permanent, year round, two story dwelling to be erected on Lot A-431; which dwelling is now and has been occupied by Plaintiff and members of her family.

> 3. Since September 1, 1962, the Plaintiff has paid all real estate taxes assessed, as to Lot A-431 and the dwelling thereon; and, has paid as requested by Defendant a pro rata share of all improvements made to the land parcel comprising Arrowhead Allotment, including a sanitary sewer system and an improved access road.
>
> 4. The named Defendant . . . is a political subdivision of the State of Ohio created, maintained and operated pursuant to §§1601.01, [sic] *et seq.*, Ohio Revised Code.
>
> 5. The Defendant has been, since September 1, 1962, the 'Lessor' of Lot A-431, Arrowhead Allotment on Atwood Lake, Carroll County, Ohio.
>
> 6. The Plaintiff, as 'Lessee', initially paid to Defendant, as 'Lessor', a ground rent of One Hundred Ten Dollars ($110) per year; thereafter, beginning on or about September 1, 1969, the ground rent was gradually increased by the Defendant, as 'Lessor', without objection by the Plaintiff, as 'Lessee', so that as of September 1, 1975, said ground rent was One Hundred Thirty One Dollars ($131) per year.
>
> 7. The Defendant, acting through its agent, William R. Lebold, had stated by letter dated August 27, 1976, addressed to Plaintiff:
>
> "The Board of Directors has authorized renewal of this lease at an annual rental of $294."
>
> 8. The Plaintiff, acting through and on the advice of counsel, has subsequently informed said William R. Lebold that the proposed annual rental of $294 is not acceptable and that the renewal lease will not be executed pending resolution of the con-

troversy relating thereto; however, Plaintiff does intend to tender to the Defendant installment payments of the requested rental of $294 in lieu of forfeiture of her rights of possession in and to the water well and dwelling described in ¶2 above pending said resolution of the controversy."

The merit allegations in the Complaint read—

"FIRST CLAIM

9. The action of the Board of Directors of the Defendant, as 'Lessor', raising and increasing the annual ground rent for Lot A-431, Arrowhead Allotment on Atwood Lake, Carroll County, Ohio, from $131 to $294 (an increase of about 225%), is an arbitrary, capricious and unreasonable exercise of their authority, causing injury and damage to the Plaintiff and risk of forfeiture of rights in property, both personal and real, by the Plaintiff, contrary to the United States Constitution, Amendment XIV §1 and 42 U.S.C. §1983."

The case for petitioner is now perceived as having been lost in the two courts below because the "lease" document contractually creating the property interest claimed by petitioner in the building site had a clause therein, on page 3, which reads—

"III. And the District hereby covenants with the Lessee as follows:

. . . .

(2) That the Lessee shall have the right and option to have this lease renewed and extended from year to year for periods of one (1) year until a date fourteen (14) years from the beginning of this lease, and the Lessee shall have the first preferential right

and option to enter into a new lease agreement at the expiration of the 14-year period, which new lease shall be similar in nature and form, but with such revision of rentals, terms and other conditions as the Board may deem necessary; and the Lessee shall have the right to similarly enter into a new lease agreement at the end of each subsequent 14-year period, provided that in all cases all of the covenants and agreements of the Lessee shall have been fully performed as herein stipulated, and provided further that this lease will not be renewed beyond a date five (5) years from the beginning of this lease, unless at the end of the five (5) years the Lessee shall have erected and is maintaining an approved cottage or dwelling house on the premises.

. . . ."

Petitioner does not dispute those findings of fact by the district court in the Opinion of November 30, 1976, which read—

"On September 1, 1962, plaintiff entered an agreement with the District leasing a certain lot for one year. In addition to other terms, said agreement provided that plaintiff could renew said lease for fourteen consecutive years. It further provided at the end of said period, plaintiff had the "first preferential right and option" to enter a new lease agreement; the District retained the right, however, to revise rentals, terms, and other conditions if it was deemed necessary. Plaintiff was required by this agreement to pay $110 per year for the first seven years as ground rent. Thereafter said rent was periodically raised until it reached $131 per year.

Plaintiff renewed the lease for each of the fourteen years. During said time period, she constructed

a cottage or dwelling costing more than two thousand dollars on said lot and effected other improvements. When the fourteenth year expired on September 1, 1976, the District sought to raise the ground rent to $295 per year. If plaintiff does not agree to this term, she has thirty days to remove her building from the lot or it reverts to the District; even then, plaintiff may be liable for the costs of removing said structure. Plaintiff argues that the subject revision of rent is not fair and reasonable and therefore is violative of her constitutional rights."

Petitioner's cause of action accrued upon her receipt of a letter from respondent. On August 27, 1976, four days prior to the expiration date of the first 14-year lease period, a Mr. Lebold, "Manager, Land Department," had written to petitioner that she had until September 8, 1976, to execute a new 14-year lease and enclosed two copies thereof. The *causa causans* letter is reproduced in the Appendix hereto (p. A10). Petitioner discussed the matter with undersigned counsel.

Petitioner's counsel soon reviewed a copy of the expiring lease. He noted therein the "after termination clause," reading in relevant part as follows:

"III. And the District hereby covenants with the Lessee as follows:

. . . .

(4) That any buildings erected by the Lessee on said premises shall be the property of the Lessee, except as herein provided, and may be removed by him [or her], . . .;

. . . .

provided also that said buildings are removed within thirty (30) days after the termination of this lease for any cause;

provided also that the *removal is done in an approved manner* that will not cause damage to any property of the District and will leave the premises in a neat and orderly condition;

and provided further that before said buildings are removed the Lessee *shall furnish surety bond* in such form and in such amount as will be satisfactory to the Board [of the defendant] conditioned upon the removal being made in a satisfactory manner.

Any building or other property of Lessee *not removed within thirty (30) days after the termination of this lease for any cause shall become the property of Lessor,* . . . ." (Emphasis added).

Petitioner was advised that she had a Hobson's choice, "either pay the increased rental or lose your house after September 30." When asked if anything legal could be done, petitioner's counsel researched the law. This action was filed September 24, 1976.

After a rather short pendency, two months and six days, this action was dismissed by the district court.

The appeal under 28 U.S.C. §1291 was promptly noticed and duly briefed. The certified record comprised sixty-six (66) pages.

Petitioner's main brief presented and argued five primary issues for review by the court of appeals—

"1. WHETHER THE DEFENDANT WAS ACTING *under color of any statute* OF THE STATE OF OHIO.

The District Court did not expressly rule on this question.

The answer should be 'Yes'.

2. DOES PLAINTIFF HAVE A *property right* PROTECTABLE BY THE UNITED STATES CONSTITUTION, AMENDMENT XIV §1 AND 42 U.S.C. §1983 AGAINST AN *unreasonable state action* BY THE DEFENDANT?

The District Court explicitly said 'No'.

The answer should be 'Yes'.

3. WHETHER THE FINDINGS BY THE DISTRICT COURT THAT PLAINTIFF WAS PAYING *ground rent* TO DEFENDANT ARE INCONSISTENT WITH THE DISTRICT COURT'S HOLDING THAT PLAINTIFF HAS NO PROPERTY RIGHT PROTECTED BY THE FOURTEENTH AMENDMENT.

The answer should definitely be 'Yes'.

4. SHOULD THE DISTRICT COURT HAVE DETERMINED *sua sponte* THAT PLAINTIFF BRINGING A §1983 *suit in equity* NEVERTHELESS HAS AN ADEQUATE REMEDY IN STATE COURT?

The District Court's holding manifested 'Yes'.

The answer should be 'No'.

5. IS THE DEFENDANT A *person* WITHIN THE MEANING OF 42 U.S.C. §1983?

The District Court said 'No'.

The answer should be 'Yes'."

Petitioner also argued, as other issues or subsidiary questions, sovereign immunity and the court of appeals Sixth Circuit Rule 3(e) decision in *Ohio Inns, Inc. v. Nye*, 542 F.2d 673 (1976), *cert. denied*, 430 U.S. 946, 97 S. Ct. 1583 (1977).

Respondent's brief presented and argued three issues for review by the court of appeals—

"1. Whether the District Court was correct in dismissing Plaintiff's Complaint for lack of subject matter jurisdiction for the reason that Defendant, Muskingum Watershed Conservancy District, as a political subdivision of the State of Ohio, is not a 'person' within the meaning of 42 U.S.C. § 1983.

2. Whether the District Court was correct in dismissing Plaintiff's Complaint for lack of subject matter jurisdiction and for failure to state a Federal Claim for relief for the reason that Plaintiff's Complaint alleged no claim under 42 U.S.C. § 1983.

3. Whether Plaintiff's Appeal is moot because Plaintiff after the Notice of Appeal was filed executed the renewal lease with Defendant and paid the required annual rental, and thereby has contractually agreed to that which she seeks the Trial Court to declare ineffective."

Thereafter, petitioner filed a reply brief directed to respondent's issue 3. These factual arguments were made—

"1. At any time subsequent to September 30, 1976, the defendant could have commenced 'eviction proceedings.'

2. While the action was pending before the District Court, the *lis pendens* jurisdiction could have been invoked by plaintiff to 'stay' any eviction proceeding.

3. After November 30, 1976, the *lis pendens* jurisdiction of the District Court was extinguished, leaving plaintiff only the protection of a Rule 62, Fed. R. Civ. P. motion.

4. By December 14, 1976, it was clear that Rule 62 protection should be sought.

5. On December 15, 1976, plaintiff's counsel withdrew the request for Rule 62 protection, after a conference with defendant's counsel, and tendered the executed renewal lease documents.

6. Neither plaintiff nor her counsel in any way intended to abandon this appeal.

7. Plaintiff's counsel would have been negligent or foolish, or both, had he enabled defendant to legally commence 'eviction proceedings' pending this appeal.

8. Plaintiff's counsel did apparently misunderstand defendant's counsel's willingness to accept the executed renewal lease documents and check in return for a withdrawal of the Rule 62 motion."

The legal argument made by petitioner against mootness read in relevant part—

"Plaintiff filed this action, on her own behalf and as a class representative, predicated on the Civil Rights Act, 42 U.S.C. §1983, and its jurisdictional implementation, 28 U.S.C. §1343(3) and/or (4). The action sought the relief of a declaratory judgment and 'such other relief as this Court shall find and deem just and equitable'.

The structure of the relief requested was consistent with a "suit in equity", as authorized by §1983. The judgment sought was in character "equitable" and in nature "injunctive".

If plaintiff prevails on the merits of her appeal, the District Court on remand and after trial will be asked to first find, predicate for injunctive relief, "a) that the action of the Board of Directors . . ., was contrary to or violative of the laws of these United States". This will be a federal constitutional question, threshold for the requisite finding of irreparable harm, damage or injury, which always must underlie the exercise by a Court of its equitable power to grant relief. If the "wrong" is found as a *matter of law*, the District Court will then be asked to—

> (b) determine or declare "a fair and reasonable annual ground rent for a Lot or premises, wherein the Defendant is 'Lessor'."

This finding would be made as a *matter of fact*, after the hearing of testimony and receiving of evidence. Equity practice has historically permitted the trial judge to make factual findings.

By way of further equitable relief, having determined the constitutional question of "wrong", and the factual question of what was "right", the District Court will be further asked to—

> (c) order or declare "that the Defendant refund or credit to the account of Plaintiff the amount of any sum previously paid . . . which is found to be in excess of a fair and reasonable annual ground rent, ..."

This finding would be an *order for restitution*, a classic remedy for a "suit in equity".

Finally, the District Court will be asked to—

> (d) order or declare "that the Defendant tender to Plaintiff a new lease . . . setting forth and requiring payment of a fair and reasonable annual ground rent".

If plaintiff prevails on the merits, the District Court will order that a third lease be tendered to plaintiff. If defendant has been unjustly enriched by plaintiff's pay-

ment for the second lease, the remedy of restitution will suffice.

If plaintiff's action were at law, sounding in tort or for breach of contract, perhaps the tender of an executed renewal lease document could be construed as a ratification of the terms thereof, even if unconscionable. However, plaintiff's case is in equity, arising under the Constitution and laws of the United States and the controversy requiring of adjudication derives from the *actions of defendant public corporation, and its directors and officers, prior to tender of the unexecuted lease* . . . more specifically—

> 'The District reviewed all of the rental rates during 1974, and directed that adjustments be made on all leases entered into or renewed after January 1, 1975.'

CONCLUSION

The issues before this Court have not been changed by any action, of defendant or of plaintiff, post-notice of appeal." (Emphasis in original)

As briefed, the appeal was argued December 6, 1976. The appeal was promptly decided *per curiam.*

During preparation of this petition for certiorari, the arguments made in the petition for rehearing by the court of appeals have been carefully reviewed. It is now thought that the thrust and essence of the arguments made therein are embodied in the QUESTIONS PRESENTED, *supra.* Therefore, this STATEMENT OF THE CASE will not be further lengthened by quotation from or paraphrase of the petition for rehearing.

ARGUMENTS

Question I

This case is in a condition, has a factually limited but adequate record, to become the third in a trilogy of recent procedural due process decisions by the Supreme Court.[1]

The March 1, 1978, opinion of Mr. Justice Rehnquist, *Bd. of Curators of University of Mo. v. Horowitz,* ..... U.S. ....., 98 S. Ct. 948, would stand for the proposition—assuming the existence of a constitutionally protected interest, a federal district court should determine that a 42 U.S.C. §1983 plaintiff had been awarded at least as much due process as the Fourteenth Amendment requires. A majority of this Court agreed with the district court that Ms. Horowitz

> "was afforded full procedural due process by the [school]. In fact, the Court is of the opinion, and so finds, that the school went beyond [constitutionally required] procedural due process by affording [respondent] the opportunity to be examined by seven independent physicians in order to be absolutely certain that their grading of the [respondent] in her medical skills was correct." (*Supra,* at 98 S. Ct. 952.)

The second decision was another school discipline case. The March 21, 1978, opinion of Mr. Justice Powell in *Carey v. Piphus,* ..... U.S. ....., 98 S. Ct. 1042, will be accepted as defining the correct standard for recovery of damages in §1983 cases where the plaintiffs are not awarded any procedural due process. But, the federal courts below will understand, the legal scholars will analyze, and the federal practitioners will appreciate, the renewed proclamation by this Court—"that a purpose of procedural due

---

1. This petition was in final draft when this Court announced its decision in *Memphis Light, Gas and Water Division v. Craft,* ..... U.S. ....., ... S. Ct. ... ., 46 L.W. 4398 (May 1, 1978) which on first reading is construed as favoring petitioners' arguments in several respects.

process is to convey to the individual a feeling that the government has dealt with him [or her] fairly, as well as to minimize the risk of mistaken deprivations of protected interests." (*Supra,* at 98 S. Ct. 1051.)

The operative facts underlying this petition are lengthy in time but easily understood. Before 1962, respondent acquired the land. During 1962, petitioner acquired some property interest in the land by a signed contract with respondent. Therefore, petitioner spent money to drill a well and build a year-round dwelling. In ensuing years, petitioner further improved her property value, along with her neighbors, by paying county and township taxes, building a sanitary sewer system, and improving the access road.

In 1974, agents or officers of the respondent took a look at what petitioner and her four hundred and four "neighbors" had done. They liked what they saw. The Corps of Engineers' reservoirs were surrounded by carefully sited dwellings, well kept by their proud owners. Without telling anyone outside the office in New Philadelphia, the respondent reviewed all of the rental rates during 1974, and *directed* [what a strong assertion of governmental authority] that adjustments be made on all leases entered into after January 1, 1975.

Petitioner was a "pioneer" on respondent's land, so she was one of the first to hear about the 1974 determination to increase the yearly payment. Petitioner was not told about the 1974 meeting when it was happening; she was told nothing in 1975; she was told in 1976, with a twelve-day deadline, that the 1974 decision was being strictly enforced. This course of conduct can only be classified as an absolute deprivation of procedural due process by an Ohio conservancy district.

This case, dealing with a "real" property interest and a claim for declaratory and equitable relief, but with no "tort" claim for damages, could be the third in the trilogy of recent procedural due process decisions.

The second aspect of Question I would provide this Court with an opportunity to advise a district court how to properly deal with a §1983 case brought by a plaintiff who has improved property, in some form or in some way, which is "legally owned" by some branch of the government. For the years to come, this Court could judicially notice the anticipated presence of government, federal or state with federal support in the real property business. Out of personal respect for the person comprising the district court in this case, we say only that a little more time, a few interrogatories or depositions, should have been allotted before closing of the door on petitioner's complaint.

The third aspect of Question I, a summary affirmance of a summary dismissal of a constitutional issue case, may be of greater interest to this Court in determining the invocation of its power of supervision. The Sixth Circuit's Rule 9 procedure may be both advisable and permitted. But should a learned panel of a court of appeals, after a fully briefed case is set and heard on oral argument, fall back on terminology developed for unusual cases to dispose of a conscientious and well-intended request for their judicial review?

An oft-quoted admonition of Mr. Chief Justice Marshall in *Cohens v. Virginia,* 6 Wheaton 264, at 404 (1821), remains as an appropriate commentary on the summary disposition of petitioner's appeal in December of 1977.

> *"It is most true that this Court will not take jurisdiction if it should not: but it is equally true that it must take jurisdiction if it should. The judiciary can-*

not, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution."

Question II

This Court, just over a year ago, announced a decision relevant to the always present consideration that a federal court may lack jurisdiction of the subject matter. Cf. *Rule 12(h)(3), Fed. R. Civ. P.* Petitioner's main brief to the court of appeals had been filed prior to January 22, 1978, when this Court announced its decision in *Concerned Citizens of Southern Ohio, Inc. v. Pine Creek Conservancy District*, ... U.S. ....., 97 S. Ct. 828.

Prior to oral argument, according to professional custom and courtesy, counsel for petitioner had advised counsel for respondent of an intention to cite to the appeals court *Concerned Citizens of Southern Ohio*. Petitioner had stated the issue as to whether the respondent is a person within the meaning of 42 U.S.C. §1983 as item 5 in her main brief. Respondent had stated the same issue as item 1 in its only brief.

Counsel for petitioner entered the courtroom knowing several things: (i) the court of appeals must be persuaded than an Ohio conservancy district is a suable person under §1983 and, therefore, the Rule 12(b)(1) dismissal by the district court was in error; (ii) that *Concerned Citizens of Southern Ohio*, even though filed and appealed pursuant to different jurisdictional statutes, represented an awareness by the Supreme Court that an Ohio conservancy district was not immune from federal court consideration of alleged due process violations; and, (iii) having obtained a copy of appellants' jurisdictional statement in the *Concerned Citizens* case, that a member of the hearing panel, the Hon. Judge John W. Peck, had also sat on the three-judge district court reversed by the Supreme Court. Counsel for petitioner also knew that both the judge of the district court and Judge Peck had at one time been members of the Ohio judiciary sitting in counties (Stark and Hamilton) where each would have been eligible to additionally serve as a judge of a conservancy court.

The time allotted for oral argument was fifteen minutes. Before the court's questioning began, petitioner's counsel was able to use the words of Mr. Justice Rehnquist, writing for this Court in *Mt. Healthy City School Dist. v. Doyle*, ... U.S. ....., 97 S. Ct. 568, to state that the case on appeal involved "an admixture of jurisdictional and constitutional claims."

Petitioner's counsel needed *Mt. Healthy* for several main issues in the appeal. The case had arisen from the Sixth Circuit; the complaint had asserted jurisdiction under both 28 U.S.C. §1343 and 28 U.S.C. §1331; this Court had recognized, but did not decide, that a cause of action might be implied directly from the Fourteenth Amendment which would not be subject to the limitations contained in §1983; this Court had again told a federal district court to look to Ohio law to determine whether there is a constitutionally protectable property interest.

Petitioner's counsel had also briefed as a secondary issue "sovereign immunity." The district court had said "Plaintiff seeks to avoid this conclusion [that the respondent as a political subdivision of Ohio is not a 'person'

within the meaning of §1983] by characterizing the District as performing 'proprietary' as opposed to 'governmental' functions. While such an argument may be relevant to sovereign immunity issues, it has no bearing here." Petitioner's counsel had prepared to respond to a question of the panel raising an Eleventh Amendment and/or sovereign immunity question by referring to *Mt. Healthy* for the proposition that the bar of the Eleventh Amendment to suit in federal courts extends to states and state officials *only* "in appropriate circumstances," and that these circumstances do not exist in this case when the State is performing a proprietary function.

Referring again to *Concerned Citizens of Southern Ohio, supra*, this Court gave consideration to the law of Ohio, Chapter 6101 of the Ohio Revised Code which establishes procedures for the organization and governance of conservancy districts. This Court identifies respondent as a political subdivision of the State invested with the power to carry out flood prevention and control measures. Petitioner's counsel respectfully asserts to this Court that the identification of the power and authority of an Ohio conservancy district in *Concerned Citizens* does not go far enough to decide the §1983 question in this case. An Ohio conservancy district is more than "a political subdivision" and can "be sued."

§6101.03(F), Ohio Revised Code, provides:

> ". . . .
>
> Every district declared upon a hearing [which occurred June 3, 1933, for respondent] to be a conservancy district shall thereupon become a political subdivision *and a public corporation of the state*, ..." (Emphasis added)

§6101.08, Ohio Revised Code, provides:

> "Upon the hearing, . . . the court, . . . shall by its findings, duly entered of record: . . .; declare the district organized; . . . . *A district so organized shall be a political subdivision of the state and a body corporate* with all the powers of a corporation, and shall have perpetual existence, *with power to sue and be sued*, to incur debts, liabilities, and obligations, *to exercise the right of eminent domain* and of taxation and assessment as provided in such sections, to issue bonds, and to do all acts necessary and proper for the carrying out of the purposes for which the district was created and for executing the powers with which it is invested." (Emphasis added)

§6101.15, Ohio Revised Code, provides:

> "In order to accomplish the purposes of the conservancy district, the board of directors of a conservancy district may:
>
> . . . .
>
> (K) Hold, encumber, control, acquire by donation, purchase, or *condemnation*, . . ., own, lease, use, and *sell* real and personal property, ..." (Emphasis added)

§6101.17, Ohio Revised Code, provides:

> "The board of directors of a conservancy district, . . ., *shall have a dominant right of eminent domain* over the right of eminent domain of railroad, telegraph, telephone, gas, water, power, and other companies and corporations, and over townships, counties, and municipal corporations." (Emphasis added)

This court could find, as a matter of federal law, that an Ohio conservancy district is a "person" within the meaning of 42 U.S.C. §1983. The Ohio statute confers the right of "eminent domain" and "condemnation." The respondent has also been granted "a dominant right of eminent domain" over any other entity in the State. Therefore, the dictum of Mr. Justice Rehnquist in *Jackson v. Metropolitan Edison Company*, 419 U.S. 345, 95 S.Ct. 449 (1974), where this Court found no "state action" in a §1983 case is now relevant to petitioner's plea. "If we were dealing with the exercise . . . of some power delegated by the State which is traditionally associated with sovereignty, such as eminent domain, our case would be a different one." (419 U.S. at 353, 95 S. Ct. at 454). See also, *Burton v. Wilmington Parking Authority*, 365 U.S. 715, 81 S. Ct. 856 (1961).

The Rule 12(b)(1) finding of the district court that petitioner had conceded "that the District is [only] a political subdivision of the State of Ohio [and therefore], it is apparent to the Court that it lacks jurisdiction of this action," was left undisturbed by the court of appeals. Petitioner's case and *Concerned Citizens of Southern Ohio, supra*, are the only two recent vintage—constitutional rights versus rights claimed by and for an Ohio conservancy district—cases now known to be pending in the federal court system. Must concerned citizens of Eastern Ohio wait until at least the next case is presented to this Court for a final determination of whether their conservancy district is a suable person under §1983?

Question III

Question III begins with a statement of facts from the record; either, derived from the as yet unanswered complaint or developed from the briefs and pleadings and exhibits in the two courts below.

The respondent is "an Ohio conservancy district." The respondent did acquire "title to unimproved farm land next to a Corps of Engineers lake." The respondent did subdivide "the farm land into unimproved building sites."

Further, the respondent did prepare a contract "conveying a property interest in a specific building site to petitioner." Virtually the same contract but for financial terms was tendered under cover of respondent's letter of August 27, 1976. Petitioner's characterization of the contract as a "contract of adhesion" is a proper fact. The phrase does not appear in the complaint. The phrase was first used in this case as a footnote to the petitioner's responsive pleading to respondent's motion to dismiss. The footnote was not challenged at the time, by either the district court or the respondent, and reads—

> [3]The "common law", and other considerations such as the U.C.C., arguable to the effect that the original lease contract, and its 1976 replication, was a "contract of adhesion", an unconscionable agreement, etc., is not set forth at this time. Counsel for Plaintiff considers these somewhat inflammatory matters as more appropriate for trial of the case on the merits.

Finally, such contract was "requiring of substantial financial investments by petitioner to increase the value within the building site area." Petitioner did drill a water well, did erect a home on Lot A-431, did pay the taxes, did fulfill all the covenants of the contract which cost her money over the years.

Question III is bifurcated to illuminate the two different entities whose actions could be reviewed and directed by this Court were this petition to be granted.

Part (a) highlights the present position of the respondent. As of this moment, the right of a conservancy district to rely on the "rights" of an expired contract to compel the petitioner to accept a contract with new rental terms, if she wished to keep her lake house and other property, are being judicially protected. The respondent has not been required "to appear in a federal district court (at a trial on the merits seeking declaratory and equitable relief) to answer and defend against petitioner's allegations."

The "unilateral executive action" goes to a procedural due process issue—the "way respondent did it"—involving the actions beginning in 1974 and not announced to petitioner until August 27, 1976. The quoted phrase "economic coercion," not in the complaint, has its genesis in a finding by the district court reading—

> "Careful analysis reveals that plaintiff's primary claim is that her freedom of choosing between economic alternatives is being unreasonably impaired. While Ohio law provides contractual and/or tortious remedies for such an impairment, it does not guarantee freedom from economic coercion."

Whether "Ohio law, . . . does not guarantee freedom from economic coercion" is not considered as being critical to petitioner's plea. The question at issue is whether the federal law, the Constitution, does guarantee freedom from economic coercion by respondent. On basics, this appears as a question involving both procedural *and* substantive due process—the "what respondent did" and the "way respondent did it" issues.

Part (a) next goes to the question of a "priority or proper balance between contract rights claimed by the conservancy district and petitioner's constitutional rights."

This phrase had its genesis in the dialogue between the appeals court and petitioner's counsel at oral argument. The panel asked several questions in the context of what the respondent did or did not have the right to do when the express terms of the September 1962 contract were considered. One of counsel's responses spoke of "abuse of rights" or "abusive use of rights" by a defendant having governmental power. Pressed to explain what that meant, counsel further responded with a rhetorical question—"Is there any person present in this room who knows, firsthand, of an appealed §1983 case where the defendant did *not* believe that he or they had a right, a perfectly valid right, to do what was done to the plaintiff? I know of no such case."

Part (a) concludes with a phrase intended to supplement petitioner's Question II, and the argument thereon above, with the real-world facts. Petitioner has been deprived neither of "life" nor "liberty." Petitioner's allegation is that she was deprived of her "property, without due process of law."

It is established federal law that an interest in property must be determined by state law. It is understood that a §1983 action has a threshold requirement for pleading, prima facie, a constitutionally protectable property interest. Paragraph 6 of the complaint pleaded "ground rent" three times. The district court's opinion of November 30, 1976, refers to both the old and the new payments as "ground rent."

Petitioner briefed to the court of appeals, but never reached during oral argument, the issue of an inconsistency between the two findings by the district court that she was paying ground rent and the Rule 12(b)(6) determination that she had no property right protected by the Fourteenth Amendment.

Petitioner provided the court of appeals with two relevant citations supporting an argument that the law of the State of Ohio is that payment of an annual or periodic ground rent is an attribute of a permanent leasehold or a vested property right. The first citation was to 20 O. JUR. 2d, *Estates* §65, page 295:

> "A ground rent proper is a rent reserved by one who conveys land to another in fee simple. In the absence of any statute affecting the common-law status of a conveyance in fee of land to one, with reservation of ground rent to the other, it has been said that each party is the owner of a fee simple estate; *the grantee's estate being a corporeal inheritance in fee in the land out of which the rent issues*, and the grantor's estate being an incorporeal inheritance in fee in the rent reserved." [Emphasis added]

The second citation was to the principal authority cited for the OHIO JURISPRUDENCE pronouncement, *Ralston Car Co. v. Ralston*, 112 Ohio St. 306, 147 N.E. 513, 39 A.L.R. 334 (1925).

That petitioner's constitutional rights are "based upon the real property law of Ohio, which provides that payment of an annual 'ground rent' is an attribute of a permanent leasehold interest in the specific building site" presents a question decided incorrectly by the district court and ignored by the court of appeals.

Part (b) of Question III involves more than merely restating part (a) in the context of what the district court should have done but did not.

Assuming that this case might have a good chance of being remanded for a trial on the merits, petitioner's counsel did not want the court of appeals to think that the tightly closed door of §1983 was being opened for petitioner solely on the key of the phrase "ground rent." Looking ahead to what could happen during a trial, the petitioner's brief said—

> "The District Court recognized that '[p]laintiff also claims that the assertedly unreasonable increase in ground rent demanded by the District created a risk of forfeiture of her real and personal property rights'. If the District Court had further recognized that ground rent is an attribute of a permanent leasehold or a vested property interest, the ultimate finding of no protectable constitutional interest would not have been made.
>
> Plaintiff does recognize that the contractual rights granted by defendant did not include language expressly providing for a permanent leasehold interest, *renewable forever*.
>
> The relevant covenant by defendant . . . guarantees plaintiff a *first* 14-year period and a *second* or new lease agreement at the expiration of the 14-year period, and *additional* or a 'new lease agreement at the end of each subsequent 14-year period'.
>
> During pretrial 'discovery', plaintiff contemplates asking of defendant why it chose to express the lease periods in repetitive 14-year increments. The answer might possibly, though unlikely, negate an ultimate finding that plaintiff was seized of a permanent leasehold or vested property interest." (Emphasis in original)

If petitioner's case would have a trial on the merits, petitioner's counsel would honor the representation made to the court of appeals. It is for this reason that Question III, part (b) refers to a controversy arising from a contract relating to a building site "owned" by the Ohio conservancy district but claimed by petitioner as a "per-

manent leasehold interest" created by annual payments of "ground rent" and by a "first preferential right and option" to renew in 14-year increments.

Factoring the issues in Question I into the issues in Question III, and assuming a resolution of Question II favorable to petitioner, in future years this case could be referred to as that federal case against an Ohio conservancy district involving—no procedural due process, alleged deprivation of substantive due process, and declaratory and equitable relief but no tort claim for damages—which was finally granted a full day in the trial court.

Argument as to a subsidiary question involving future rights of a proposed class and comprised within Question II

The unilateral executive action by the respondent was in 1974. The decision to make adjustments on all contracts renewed after January 1, 1975, was never published. Attached to respondent's motion to dismiss the complaint, filed October 15, 1976, was an Exhibit C listing the "number of existing cottage site leases on district reservoirs by year of lease execution."

The Complaint filed September 24, 1976, included—

"CLASS ACTION ALLEGATIONS

12. The FIRST CLAIM is also brought as a class action under Rule 23(b)(2), Fed. R. Civ. P., on behalf of members of a class or sub-classes meeting the following qualifications:

(a) became a 'Lessee' of a Lot in Arrowhead Allotment on Atwood Lake, Carroll County, Ohio, during the year 1962 or at any time prior to the year 1970; or,

(b) became a 'Lessee' of a Lot in any other allotment or premises on Atwood Lake, Carroll County, Ohio, wherein the Defendant was 'Lessor', during the year 1962 or at any time prior to the year 1970; or,

(c) became a 'Lessee' of a Lot in any other allotment or premises on any other lake in the State of Ohio, wherein the Defendant was 'Lessor', during the year 1962 or at any time prior to the year 1970; or, if not otherwise qualified,

(d) was a 'Lessee' of a Lot in any allotment or premises on any lake in the State of Ohio, wherein the Defendant was 'Lessor', and whose rental rate was reviewed during 1974, and thereafter such reviewed rental rate was determined to be the subject of an adjustment if renewed after January 1, 1975.

13. The FIRST CLAIM is also brought as a class action under Rule 23(b)(2), Fed. R. Civ. P., on behalf of the class of 'Lessees' of any Lot or premises, wherein the Defendant is 'Lessor', and who will be affected or benefited by any final injunctive relief or corresponding declaratory relief sought by Plaintiff with respect to Defendant."

The real numbers in this case are, using the respondent's data in Exhibit C: for the proposed ¶12(a) and (b) class, one hundred forty-one (141); for the proposed ¶12(c) class, two hundred sixty-four (264); and, for the combined groups in the proposed ¶12(d) class, four hundred five (405).

Fairly comprised within Question II is a subsidiary question. Where do these other proposed class members now go to seek a judicial process determination of their

constitutional rights vis-á-vis the contract rights claimed by respondent and now judicially protected? The federal courts below have now said, in effect—petitioner cannot come to our door and seek declaratory and equitable relief. The rejection may have been accomplished in such a manner and style as to preclude, on a res judicata bar or collateral estoppel defense, petitioner or any other aggrieved proposed class member from turning to the Ohio court system. Cf. *Ellentuck v. Klein,* 570 F.2d 414, 422 (2nd Cir., 1978), where a state court dismissal for want of a substantial constitutional question made res judicata and collateral estoppel applicable against a class of plaintiffs in a subsequent federal action.

It was argued to the court of appeals that the district court dismissed on two grounds moved by respondent: Fed. R. Civ. P. 12(b)(1), lack of jurisdiction over the subject matter; and 12(b)(6), failure to state a claim upon which relief can be granted. The attention of the Court of Appeals was directed to a recent decision by the Fifth Circuit, *Hitt v. City of Pasadena,* 561 F.2d 606 (1977), reviewing the district court's order of dismissal based both on want of federal jurisdiction and failure to state a claim. The *per curiam* opinion in *Hitt* says, at page 608—

> "The district court's order dismissing the case was apparently based both on want of federal jurisdiction as well as on failure to state a claim on which relief could be granted. Ordinarily, where both these grounds for dismissal apply, the court should dismiss only on the jurisdictional ground under Fed.R.Civ.P. 12(b)(1), without reaching the question of failure to state a claim under Fed.R.Civ.P. 12(b)(6). C. Wright & A. Miller, Federal Practice and Procedure: Civil § 1350 (1971). Dismissal with prejudice for failure to state a claim is a decision on the merits and essentially ends the plaintiff's lawsuit, whereas a dismissal on jurisdictional grounds alone is not on the merits and permits the plaintiff to pursue his claim in the same or in another forum.
>
> It is not clear from the district court's opinion whether each claim against each defendant was dismissed on both grounds, i.e., want of jurisdiction as well as failure to state a claim. But even supposing that it were proper to reach the 12(b)(6) issue as to all of the defendants, the district court's dismissal on the merits with prejudice was unduly harsh under the circumstances of this case."

The court of appeals for the Sixth Circuit has declined to answer petitioner's question as to whether the action of the district court was in substantive conflict with the rule of law adopted by the Fifth Circuit in *Hitt.*

This court could rule on the substantive rights of the proposed class members—as these rights may have been affected by the Rule 12(b)(6) dismissal on the merits and the doctrines of res judicata and collateral estoppel—consistent with and approving of the Fifth Circuit's disposition of *Hitt v. City of Pasadena, supra.*

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

MACK D. COOK, II
900 First National Tower
Akron, Ohio 44308
(216) 376-1005
Attorney for Petitioner

APPENDIX

ORDER OF THE DISTRICT COURT

(Filed November 30, 1976)

Civil Action C 76-300 A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGIENA N. COOK,
Plaintiff,

v.

MUSKINGUM WATERSHED
CONSERVANCY DISTRICT,
Defendant.

ORDER

Defendant Muskingum Watershed Conservancy District (hereinafter District) has moved the Court to dismiss this action. Upon consideration and for the reasons stated below, said motion shall be granted.

Invoking the Court's jurisdiction under 28 U.S.C. §1343, plaintiff initiated this class action for declaratory, injunctive and monetary relief. Essentially, plaintiff alleges that the District's decision to raise the ground rent for a lot at Atwood Lake leased by plaintiff is an arbitrary, capricious, and unreasonable exercise of authority, and therefore violative of 42 U.S.C. §1983.

In support of its motion, the District has submitted factual materials which have not been controverted by plaintiff. Said materials, when read together with the complaint, reveal the following factual setting:

On September 1, 1962, plaintiff entered an agreement with the District leasing a certain lot for one year. In addition to other terms, said agreement provided that plaintiff could renew said lease for fourteen consecutive years. It further provided at the end of said period, plaintiff had the "first preferential right and option" to enter a new lease agreement; the District retained the right, however, to revise rentals, terms, and other conditions if it was deemed necessary. Plaintiff was required by this agreement to pay $110 per year for the first seven years as ground rent. Thereafter said rent was periodically raised until it reached $131 per year.

Plaintiff renewed the lease for each of the fourteen years. During said time period, she constructed a cottage or dwelling costing more than two thousand dollars on said lot and effected other improvements. When the fourteenth year expired on September 1, 1976, the District sought to raise the ground rent to $295 per year. If plaintiff does not agree to this term, she has thirty days to remove her building from the lot or it reverts to the District; even then, plaintiff may be liable for the costs of removing said structure. Plaintiff argues that the subject revision of rent is not fair and reasonable and therefore is violative of her constitutional rights.

A political subdivision of a state is not a "person" within the meaning of §1983. See *Monroe v. Pape*, 365 U.S. 167, 81 S.Ct. 473 (1961); *City of Kenosha v. Bruno*, 412 U.S. 507, 93 S.Ct. 2222 (1973). Cf. *Bishop v. Wood*, ... U.S. ....., 96 S.Ct. 2074, n.1 (1976); *Hanna v. Drob-*

nick, 514 F.2d 393 (6th Cir. 1975); *Vick v. Texas Employment Commission*, 514 F.2d 734 (5th Cir. 1975). As plaintiff concedes that the District is a political subdivision of the State of Ohio, it is apparent to the Court that it lacks jurisdiction of this action.

Plaintiff seeks to avoid this conclusion by characterizing the District as performing "proprietary" as opposed to "governmental" functions. While such an argument may be relevant to sovereign immunity issues, it has no bearing here. Congress' intent in restricting §1983 claims to "persons" was to exclude from liability the "mere instrumentality for the administration of state law." *Monroe v. Pape*, 365 U.S. at 190, 81 S.Ct. at 485-6, quoting from Cong. Globe, 42nd Cong., 1st Session 804. As it is clear that both proprietary and governmental functions are proper subjects of state law, the Court perceives no valid cause to develop such a distinction herein.

As additional and alternative grounds, the Court concludes that, apart from this deficiency, plaintiff has failed to assert a claim cognizable in a federal court. Though not so denominated, it is clear that plaintiff rests her case upon a presumed denial of due process.

Due process guarantees protect only property rights or liberty interests. Cf. *Bishop v. Wood, supra.* Analysis of plaintiff's claims for the purpose of identifying either such interests has convinced the Court that they are lacking.

Plaintiff clearly has the first preferential right to enter a new lease with the defendant. This right arises from the original agreement, and is expressly conditioned upon the district's right to adjust the ground rent. While such an option right might arguably qualify as a property right, there is no claim that it is being denied plaintiff. Rather,

it is clear that the District has offered plaintiff the first opportunity to enter into a new agreement for said lot. As plaintiff has not alleged that the District has established a proposal which is so patently beyond her means as to effectively preclude her exercise of said option, the Court can only conclude that plaintiff is not asserting a deprivation of her option right.

Plaintiff also claims that the assertedly unreasonable increase in ground rent demanded by the District creates a risk of forfeiture of her real and personal property rights. Plaintiff is apparently referring to the possible loss of her cottage and its contents should she fail both to accept the District's proposal and to remove said property within the requisite period of time. Essentially then, plaintiff is asserting that she is, by economic necessity, being compelled to accept defendant's unreasonable actions. Yet the difficult economic choice confronting plaintiff results solely from the terms of the agreement previously executed by her. This Court will not presume that the specific terms thereof regarding removal of property are per se unreasonable. Thus, plaintiff has viable economic alternatives and it may not fairly be said that the District is depriving her of her cottage and her personal property. Careful analysis reveals that plaintiff's primary claim is that her freedom of choosing between economic alternatives is being unreasonably impaired. While Ohio law provides contractual and/or tortious remedies for such an impairment, it does not guarantee freedom from economic coercion. Such limited protection does not grant plaintiff a property right or liberty interest protected by the Fourteenth Amendment. Cf. *Paul v. Davis,* ..... U.S. ....., 96 S.Ct. 1155, 1166 (1976); *Bishop v. Wood, supra.*

Stated differently, plaintiff's claims arise under state law and are essentially for an alleged breach of contract.

As recently stated by the Sixth Circuit Court of Appeals:

> "Section 1983 was never intended as a catchall statute under which myriads of suits, traditionally within the exclusive jurisdiction of state courts, may be filed in the federal courts in the absence of a showing of deprivation of a constitutional right." (Footnote omitted). *Ryan v. Aurora City Board of Education,* 540 F.2d 222, 226 (1976).

As the Court has found that no constitutionally protected right or interest is involved in this lawsuit, it must conclude that plaintiff's only forum for her complaint is in state court.

Accordingly, defendant's motion to dismiss must be, and the same hereby is, granted.

IT IS SO ORDERED.

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

JUDGMENT ENTRY OF THE DISTRICT COURT

(Filed November 30, 1976)

Civil Action C 76-300 A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

GEORGIENA N. COOK,
Plaintiff,

v.

MUSKINGUM WATERSHED
CONSERVANCY DISTRICT,
Defendant.

JUDGMENT ENTRY

The Court having granted defendant's motion to dismiss,

IT IS ORDERED, ADJUDGED and DECREED that this action is hereby dismissed.

/s/ LEROY J. CONTIE, JR.
U. S. District Judge

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed December 19, 1977)

No. 77-3059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGIENA N. COOK,
Plaintiff-Appellant,

v.

MUSKINGUM WATERSHED CONSERVANCY
DISTRICT,
Defendant-Appellee.

ORDER

Before: EDWARDS, CELEBREZZE and PECK, *Circuit Judges.*

This action was filed by Plaintiff-Appellant, in the United States District Court for the Northern District of Ohio, Eastern Division, against Defendant-Appellee for declaratory, injunctive and monetary relief. In its complaint Appellant alleged jurisdiction under 28 U.S.C. 1343 and further alleged that a claim existed under 42 U.S.C. 1983 because of Appellee's action in increasing the rent as a condition of renewal of an expired lease was an unconstitutional exercise of authority by Appellee.

Appellee is a political subdivision of the State of Ohio, and is the fee simple owner of the land in question. The lease entered into was for a term of one year beginning September 1, 1962, for a rental of $110. per year, the

lease also provided for a year to year renewal for a period of fourteen years; by periodic increases Appellant was paying $131. per year for the fourteenth year of the lease. The lease expired on September 1, 1976, fourteen years from commencement. Appellee tendered a proposed new lease agreement for an additional fourteen year period for an annual rental of $294. Appellant refused to execute a new lease and filed suit in the Federal District Court under 42 U.S.C. 1983, alleging an unconstitutional exercise of authority by Appellee. During the pendency of this action Appellant accepted the terms of the new lease.

The District Court granted Appellee's motion to dismiss for lack of jurisdiction, in addition that Appellant's claim did not constitute a claim for relief recognizable under 42 U.S.C. 1983.

Upon due consideration of the record on appeal, the briefs and oral argument of counsel we find this appeal to be completely frivolous, Accordingly,

It is ordered that the judgment of the District Court be and it hereby is affirmed.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

ORDER OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING

(Filed February 15, 1978)

No. 77-3059

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

GEORGIENA N. COOK,
Plaintiff-Appellant,

v.

MUSKINGUM WATERSHED CONSERVANCY DISTRICT,
Defendant-Appellee.

ORDER

Before: EDWARDS, CELEBREZZE and PECK, *Circuit Judges.*

Appellant filed a petition for rehearing with a request for rehearing en banc. No Judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

Entered by Order of the Court

/s/ JOHN P. HEHMAN
Clerk

A10

EXHIBIT 1

MUSKINGUM WATERSHED CONSERVANCY DISTRICT

NEW PHILADELPHIA, OHIO 44663

1319 THIRD STREET, N.W., P.O. BOX 349 — (216) 343-6647

GENERAL MANAGER & SECRETARY TREASURER
RAYMOND E. EICHEL

CHIEF ENGINEER
DAVID A. BOWER

CHIEF COUNSEL
SMITH, RENNER, HANHART, MILLER & KYLER

DIRECTORS

D. K. WOODMAN, PRESIDENT
MANSFIELD, OHIO

ROBERT W. PORKER, VICE PRESIDENT
ZANESVILLE, OHIO

ARTHUR L. CHRISTENSON
CANTON, OHIO

August 27, 1976

Mrs. Georgiena N. Cook
2998 Silver View Dr.
Silver Lake, OH, 44224

Dear Mrs. Cook:

As you no doubt realize, your lease on lot A-431 at Atwood Lake expires September 1, 1976. The District reviewed all of the rental rates during 1974, and directed that adjustments be made on all leases entered into or renewed after January 1, 1975. The adjustments reflect increased values within cottage site areas and additional District operating costs. It was determined that these new adjustments were essential to maintain established standards.

The Board of Directors has authorized renewal of this lease at an annual rental of $294.00. This amount will be changed each year in strict accordance with the BLS Cost of Living Index as provided in paragraph (3) of section III of your lease. Please read your lease thoroughly.

Will you please sign both copies where indicated, being sure to have two witnesses sign opposite, and return them to me by September 8 along with your check in the amount of $294.00 to cover the first year's rental under the new lease.

Sincerely,

William R Lebold

William R. Lebold, Manager
Land Department

WRL:mh
Encs.